

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

COMMUNICATIONS WORKS OF
AMERICA, LOCAL 7901, AFL-CIO

Charging Party,

-and-

FUND FOR THE PUBLIC INTEREST, INC.,

Respondent.

Case No. 19-CA-094311

**RESPONDENT'S REPLY BRIEF TO
GENERAL COUNSEL'S
ANSWERING BRIEF**

The Fund for the Public Interest ("Respondent") submits its Reply Brief to General Counsel's Answering Brief in support of its request that its exceptions be sustained and would show the Board the following:

I. Neel should be disqualified from reinstatement and backpay by Respondent's post-discharge discovery that Neel was previously convicted of rape, sodomy, and sexual abuse.

A. Respondent had no knowledge of Neel's criminal history prior to his discharge.

B. Respondent's established workplace policy, which requires the National TOP Director to evaluate criminal convictions on a case-by-case basis, went as far as it legally could toward a blanket policy of disallowing employment of individuals with violent criminal histories because it was drafted in accordance with guidance issued by the Equal Employment Opportunity Commission and subsequently adopted by the Oregon Bureau of Labor and Industry.

C. There is no evidence in the record that Respondent ever knowingly hired or allowed to remain on staff an individual with a violent criminal past.

D. Ignoring Neel's convictions for rape, sodomy, and sexual abuse and requiring reinstatement would result inequitable consequences.

ARGUMENT

I. Neel should be disqualified from reinstatement and backpay by Respondent's post-discharge discovery that Neel was previously convicted of rape, sodomy, and sexual abuse.

When an employee is unlawfully discharged, reinstatement and backpay are appropriate remedies unless the employer can show subsequent conduct, or discovery of previous conduct, that would have resulted in a lawful discharge. *Berkshire Farm Center*, 333 NLRB 367 (2001); *Marshall Durbin Poultry Co.*, 310 NLRB 68, 70 (1993); *John Cuneo, Inc.*, 298 NLRB 856-857 (1990). If an employer establishes that an employee engaged in misconduct for which the employer would have discharged any employee, the employee is disqualified from reinstatement and the employer's backpay obligation is terminated on the date that the employer first acquired knowledge of the misconduct. *John Cuneo, Inc.*, 298 NLRB 856 (citing *Axelson, Inc.*, 285 NLRB 862 (1987)). Applying this legal standard, the Board has consistently found that the traditional remedies of reinstatement and backpay should be modified or eliminated where employee misconduct, including misconduct occurring before employment began, would result in an inequitable result. *See, e.g., Marshall Durbin Poultry Co.*, 310 NLRB 68 (denying reinstatement and tolling backpay due to terminated employee's pattern of workplace sexual misconduct occurring prior to employment with respondent); *John Cuneo, Inc.*, 298 NLRB 856-857 (denying reinstatement and tolling backpay due to willful misrepresentations by terminated employee on application for employment).

A. Respondent had no knowledge of Neel's criminal history prior to his discharge.

General Counsel argues that Respondent, through its supervisor Raley, learned of Neel's convictions for rape, sodomy, and sexual abuse prior to Neel's termination (GC Br. 14). However, there is no direct evidence in the record that Raley nor any other of Respondent's supervisors knew of Neel's convictions prior to his termination. Rather, General Counsel asks the Board to infer that Raley knew of Neel's convictions based on testimony by Neel that he revealed his criminal past to Chelsea Callahan, Ben Woodhouse, Adam Miller, Kris Humbird,

Mike Schultz, and Cortina Robinson. (Tr. 125:1-7). But Neel's self-serving testimony is both unreliable and uncorroborated. General Counsel called several of Neel's coworkers to testify over the course of the hearing, including Woodhouse. Neither Woodhouse nor any other of Neel's coworkers testified that they had been informed of Neel's convictions, either directly by Neel or indirectly by other coworkers. Because Woodhouse and the other coworkers would be inclined to testify favorably for Neel and unfavorably for Respondent, General Counsel's failure to provide corroborating evidence through those witnesses strongly supports the inference that Neel did not personally reveal his convictions to the coworkers he named nor was the fact of his convictions common knowledge in the Portland TOP Office.

The only other record evidence cited by General Counsel, a series of online comments concerning Neel's convictions made by a person with the screen name "ddrocksar" in response to a *Portland Mercury* article, is similarly unpersuasive. As General Counsel concedes in its brief, the critical inquiry here is whether Respondent knew of Neel's convictions prior to his termination (GC Br. 13-14). Even if, as General Counsel alleges, Raley was the person responsible for the comments, the only thing those comments conclusively prove is that Raley knew of Neel's conviction on the date the comments were published – February 26, 2013 – more than three months after Neel's termination on November 6, 2012.

The weight of the record evidence, including the only direct evidence on point, supports only one conclusion: Respondent did not learn of Neel's convictions through Raley or any other of Respondent's supervisors until after his termination on November 6, 2013. Fielding testified that she was not informed of Neel's convictions by Neel, Raley, or any other of Respondent's supervisors prior to Neel's termination; rather, she first learned of Neel's convictions on or around February 26, 2013, more than three months after Neel was terminated (Tr. 222-24).

Wood testified that he learned of the convictions on March 6, 2013, also more than three months after Neel was terminated (323-24). Fielding and Wood's testimony in this regard should be given extra weight in that it was corroborated in part by Neel himself, who admitted that he did not inform any of the Portland TOP Directors, including Raley, of his convictions during the hiring process or at any point during his employment (Tr. 114-18).

B. Respondent's established workplace policy, which requires the National TOP Director to evaluate criminal convictions on a case-by-case basis, went as far as it legally could toward a blanket policy of disallowing employment of individuals with violent criminal histories because it was drafted in accordance with guidance issued by the Equal Employment Opportunity Commission and subsequently adopted by the Oregon Bureau of Labor and Industry.

General Counsel incorrectly argues that Respondent's policy concerning criminal convictions is insufficient to show that Respondent would have terminated Neel based on his convictions for rape, sodomy, and sexual abuse because they "do not call for the discharge of employees for criminal convictions or specify which types of convictions could result in discharge." (GC Br. 15). Applicable law prohibits Respondent from implementing a blanket policy against employing individuals with criminal convictions (*see* R Br. 33-34) or from taking the slightly less drastic approach urged by General Counsel: implementing a blanket policy against employing individuals with certain types of convictions. Having analyzed relevant federal case law, the Equal Employment Opportunity Commission ("EEOC") has issued enforcement guidance, stating that "An employer's neutral policy (e.g., excluding applicants from employment based on certain criminal conduct) may disproportionately impact some individuals protected under Title VII, and may violate the law if not job related and consistent with business necessity (disparate impact liability)." EEOC, "Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964" (citing *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir.

1977)), *available at* http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm. To be “job related and consistent with business necessity” an employer’s criminal history policy must include “a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job. The employer’s policy then provides an opportunity for an individualized assessment for those people identified by the screen, to determine if the policy as applied is job related and consistent with business necessity.” *Id.* The Oregon Bureau of Labor and Industries (“BOLI”) has adopted the EEOC’s enforcement guidance and issued a related advisory to Oregon employers. BOLI, “Criminal Background Checks: Employers Should Exercise Some Caution,” *available at* http://www.oregon.gov/boli/TA/docs/TA_Col_07-10-12_Background_Checks.pdf. In short, Respondent’s policy – which provides an opportunity for an individualized assessment of an employee’s criminal convictions – was drafted using the strongest possible language allowed under relevant federal and state civil rights law and related guidance.

Respondent’s policy calls for a screening of applicants and employees’ criminal histories. Respondent’s written policy describes the first step in this screening process during which TOP directors who discover that an applicant or current employ has a history of criminal convictions are instructed to submit relevant materials to the National TOP Director for immediate review and possible termination:

As you can imagine, employing callers with certain criminal histories could expose the Fund and the organizations with which it works to liability as well as to unfavorable publicity. While we can’t have an across-the-board rule that we will never hire or keep a person with a criminal history on staff, there are instances where we would be well within our rights, and well-advised, to not hire or terminate such a person. We have developed the following policy to ensure that criminal histories are flagged.

Should it come to your attention that a caller candidate has a criminal history (beyond driving infractions), you should **not** question the candidate about the criminal history either on the phone or during an in-person interview. Rather, you should conduct the interview as usual, but do not offer the candidate a position until you have reviewed the candidate's application with the National TOPD.

Should it come to your attention that a caller already on staff has a criminal history, please refer the matter to the National TOPD for immediate review as to whether we should continue to keep that person on staff.

Please contact the National TOPD if you have questions concerning this policy.

(GC Br. 13) (emphasis added). The remaining steps in the screening process are accurately and fully recounted in the record (Tr. 301-303, 337-38). Wood, the National TOP Director, testified that he considers an applicant or employee's convictions on a case-by-case basis to determine whether the person is qualified for employment with Respondent (Tr. 337-38). When making this decision, Wood considers the nature of the crime, date of the convictions, and the nature of the job (Tr. 337-38). According to Wood, Neel's 2005 convictions for rape, sodomy, and sexual abuse would have disqualified Neel from employment due to the obvious workplace safety concerns involved in allowing a violent felon to work in close proximity with other employees (Tr. 301-303, 337-38).

C. There is no evidence in the record that Respondent ever knowingly hired or allowed to remain on staff an individual with a violent criminal past.

Because applicable law prohibited Respondent from having a blanket policy against employing individuals with violent criminal pasts, the best available evidence to show that Respondent would not knowingly employ a violent criminal is the fact that the record is devoid of any evidence that Respondent has ever done so. On the other hand, the record clearly indicates that Wood, the National TOP Director and person responsible for deciding whether an employee with a criminal past should be terminated, would have terminated any employee who he knew to have a violent criminal past (Tr. 301-303).

D. Ignoring Neel’s convictions for rape, sodomy, and sexual abuse and requiring reinstatement would result inequitable consequences.

General Counsel objects to Respondent’s references to Neel’s convictions for rape, sodomy, and sexual abuse in Respondent’s Exceptions and Supporting Brief and suggests that these factual references are both “misleading” and “suggest(ive of) a degree of continuing malice toward Neel” (GC Br., fn 5).¹ Specifically, General Counsel objects to the fact that Respondent refers to Neel’s conviction for “rape in the third degree” (R. 15) without qualifying that this conviction resulted from the statutory rape of a 15-year-old girl. Respondent is baffled by General Counsel’s implication that statutory rape is somehow not as heinous as other forms of rape and its corresponding conclusion that Respondent it is not justified in worrying about reemploying Neel given that conviction. Respondent believes that the rape of a minor is every bit as heinous and worrying as the rape of an adult. And Respondent is, quite frankly, alarmed by the possibility that the Board will force Respondent to allow the perpetrator of such a crime to work alongside its employees, which includes a large number of young women who are barely older than Neel’s victim.

It is not surprising that General Counsel would downplay the heinous nature of Neel’s rape conviction. If it is acknowledged, the logic supporting General Counsel’s line of argument crumbles: namely, that justice requires the Board to order reinstatement without regard for the safety and well being of Respondent’s other employees. If Neel’s criminal history truly consisted of less serious crimes such as shoplifting or traffic violations (a category of infractions among which, apparently, General Counsel would have the Board place statutory rape), justice

¹ Tellingly, General Counsel does not object to Respondent’s repeated reference to Neel’s conviction for sexual abuse in the second degree as “sexual abuse,” despite the fact that such conviction was based on allegations that he forced his ex-wife to have sexual intercourse with him against her will – an act commonly understood to constitute “rape,” regardless of how it is classified under Oregon law, and actually referred to as such both by a *Portland Mercury* reporter (R. 13) and Neel himself (Tr. 123).

might require the Board to turn a blind eye toward Neel's convictions and order reinstatement. But, given the very real and frightening nature of the conduct which resulted in Neel's convictions, the Board simply cannot afford to proceed without first considering the pragmatic concerns at issue here. Were the Board to order reinstatement, Respondent would be placed in a situation where it would be forced to risk the safety, on a daily basis, of the young women in its employ; manage its Portland TOP Office in a manner contrary to its own best judgment; and increase its legal exposure to potential negligent retention lawsuits. Respondent, understanding that Neel presents a threat to the safety and well being of current and future employee's safety, would nonetheless be powerless to remove that threat unless and until Neel were to commit another crime. Respondent implores the Board not to put it in such an untenable position.

REQUEST FOR RELIEF

For the foregoing reasons, Respondent respectfully requests that the Board sustain its exceptions and deny enforcement of the ALJ's decision.

s/ Brent Jordheim
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document, Respondent's Reply Brief to General Counsel's Answering Brief, in case no. 19-CA-94311 was filed electronically with the Board's e-filing system. Respondent's Reply Brief was also filed by electronic mail with Counsel for the Acting General Counsel, National Labor Relations Board, Subregion 36 (Helena.Fiorianti@nlrb.gov, Anne.Pomerantz@nlrb.gov, Linda.Davidson@nlrb.gov, Kristy.Kennedy@nlrb.gov), and with Madelyn Elder (president@cwa7901.org), Representative for the Charging Party, this 31st day of January, 2014.

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